No. 82-1699

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1982

OAKLAND SCAVENGER COMPANY,
*Petitioner,*

vs.

JOAQUIN MORELES BONILLA, et al.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION

B. V. YTURBIDE
GUNHEIM & YTURBIDE
414 Gough Street, Suite 6
San Francisco, CA 94102
(415) 626-3450
*Attorneys for Respondents*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

## QUESTIONS PRESENTED

Whether this Court's intercession is either sufficiently urgent or wise in an interlocutory context (1) in which substantive and procedural errors committed by the district court will in all events require further proceedings in that court on vital issues, including at minimum one entire facet of the racial and ethnic discrimination in employment involved but unaddressed by that court or the present petition, and (2) in which, pending elucidation by additional evidence in the further proceedings, the decision of the Court of Appeals does not threaten precipitous frustration of, but potentially expedites, the wholesome policy and purpose of the Congressional enactments prohibiting employment discrimination based on race or national origin?

Variantly put, whether, in such a context, the inevitable delay occasioned by this Court's interlocutory review in the full litigation and potential cure of at least one entire facet of invidious employment discrimination is sufficiently justified by the petition's exclusive concerns with the other facet of discrimination involved, including the alleged conflict with the Eleventh Circuit in a matter now pending before this Court, *Hishon v. King & Spaulding* (U.S. Supreme Court Docket No. 82-940, cert. granted January 24, 1983) 51 U.S.L.W. 3552?

Whether, on proper assessment of the facts and the instant opinion of the Court of Appeals, the errors and perils attributed to the opinion by the petition, including the alleged kinship and conflict with *Hishon*, are truly present at all, let alone with the sufficiency and urgency calling for this Court's intercession in the interlocutory context involved?

## INTERESTED PARTIES

With an important caveat, the list of interested parties set forth in the petition may be accepted as correct. As is clear from their pleading, respondents seek to represent a class (thus far uncertified) of all persons similarly situated, and, although it is not now feasible to name the absent but potential class members, their involvement and interest through representation is worthy of note.

## TABLE OF CONTENTS

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Statutes



## Other Authorities

No. 82-1699

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1982

OAKLAND SCAVENGER COMPANY,
*Petitioner,*

vs.

JOAQUIN MORELES BONILLA, et al.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully submit that the present petition should be denied for the reasons stated below.

### I

### THIS COURT'S INTERCESSION IS NEITHER URGENT NOR WISE IN THE INTERLOCUTORY CONTEXT INVOLVED

#### A. Further Proceedings in the District Court on Vital Issues Will in All Events Be Required by Reason of Its Substantive and Procedural Errors Correctly Analyzed by the Court of Appeals and Impossible of Meaningful Defense by Petitioner.

One cogent ground for denial of the petition, without more, is the purely interlocutory posture of the litigation at this juncture. Denial on that ground is consistent with the general rule followed by this Court and is particularly ap-

propriate here in light of special considerations fortifying a refusal to intercede at this stage. Whatever else may be true, it is beyond question that the district court committed substantive and procedural errors in respects requiring reversal and remand in all events and that further proceedings in that court will, therefore, be necessary on vital issues, including one entire facet of the invidious employment discrimination involved. The Court of Appeals correctly analyzes the situation in the first part of its opinion (Appendix A to Petition, pp. 6-9), and petitioner does not even purport to attack that part of the opinion in any way meaningful to intervention by this Court, addressing itself only to the second part of the opinion for all practical purposes.

**1. The Errors.**

In spite of emphasis by respondents at the time, the district court in dismissing the case inexplicably overlooked that, both by their pleading and their showing in opposition to dismissal, respondents were claiming invidious employment discrimination of two kinds, namely, as between, on the one hand, nonshareholding employees of the company who are black or Spanish-surnamed (hereinafter "minority employees") and other nonshareholding employees and as between, on the other hand, nonshareholding minority employees and shareholding employees, who are exclusively of Italian ancestry. Among the data developed by discovery in the former connection were, for example, that, as of the end of 1978, there were 21 nonshareholders in the desirable position of head route driver. Under the pertinent population factors of 15% and 12.6% applicable to black and Spanish-surnamed persons respectively, it is apparent that, given equal or greater seniority and the lack of discrimi-

nation, 3 black and 2 or 3 Spanish-surnamed employees would have been among the persons holding those 21 positions. Yet, this was far from the truth. Even though, at the end of 1978, the company employed 48 black persons, 10 of them hired before 1960, none of them was a head route driver, and, even though there were then 119 Spanish-surnamed employees, 26 of them hired before 1960, only one of them was a head route driver, having obtained that position in 1978. Of the 21 nonshareholding head route drivers at the end of 1978, 15 were employees who were neither black nor Spanish-surnamed and who were hired in or after 1970, 10 or more years junior to the 10 black and 25 Spanish-surnamed employees denied that position.

Nevertheless, the district court focused exclusively (as had the company and the union in their moving papers) on the other facet of discrimination claimed and simply failed to consider or even mention the claim of discrimination as between nonshareholding minority employees and other nonshareholding employees. (See Appendix C to Petition.) To make matters worse, although purporting to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court considered some matter extraneous to the pleadings submitted by the company, which, of course, under the terms of the rule itself, meant that dismissal could no longer occur under that rule but only, if at all, through summary judgment in conformity with Rule 56. However, viewed as a ruling on a motion for summary judgment with due regard for the requirement that the record must be considered in the light most favorable to the opponent, the dismissal was no more defensible since the court gave no consideration whatsoever to the submissions by respondents, including the showing of the facet

of discrimination totally ignored. (E.g., *U. S. v. Diebold*, 369 U.S. 654, 655 (1962).) Still more, as to the other and only facet of discrimination discussed, whatever salvation could be accorded to the company by the court's reasoning of nepotistic motivation, proprietary right, and the like was certainly unavailable to the union, and yet the dismissal was granted as to the union as well, without any separate discussion of its position.

In short, the dismissal resulted from an incurable, substantive and procedural muddle requiring reversal and remand, regardless of the validity of the accompanying analysis as far as it went and could go.

### 2. The Correctness of the Court of Appeals' Disposition Without Meaningful Attack by Petitioner.

Inevitably, and on the basis of ample reason and authority, the opinion of the Court of Appeals (Appendix A to Petition, pp. 6-9) makes clear the errors committed with respect to the facet of discrimination ignored by the district court and the consequent need to reverse and remand in all events. Although not giving the details, it does recognize (at p. 8) the existence of a "disproportionately low number of minority employees in the preferred driver position." After leaving no doubt that the result is not premised on the procedural mishap alone but would be the same whether on motion to dismiss or motion for summary judgment, it concludes (at p. 9) that "the pleadings, affidavits, and depositions raise a genuine issue of fact as to whether the Company intended to prefer white nonshareholder-employees over black and Spanish-surnamed nonshareholder-employees" and that, upon the present "record," respondents are entitled to a trial on the merits of

"this allegation of discrimination." Later (at pp. 13-14), the error and need to remand as to the union (which did not oppose the appeal) is also duly acknowledged.

Now, as in the district court and the Court of Appeals, petitioner essentially aims its arguments at absolution as a matter of law from the other claim of invidious discrimination. It does not and cannot attempt to criticize the disposition on appeal as to the union. Similarly, as to the part of the opinion concerning discrimination among nonshareholding employees, it does not challenge the holding in substance or the further proceedings in the district court required thereby. It does peripherally complain that the analysis is too limited, addressing the matter only under Title VII and leaving the applicability of Section 1981 silently at large, and that the Court of Appeals later joins in the procedural approach for which it castigates the district court, namely, consideration of matter extraneous to the pleadings. Both of these asserted shortcomings are justifiable in the traditional performance of the appellate office, but, in any event, neither silence on an additional ground when one suffices nor judicial housekeeping as to a procedural concern of this kind can gainsay the need for further proceedings in the district court or rank so high among pressing national issues as to warrant this Court's intercession in an interlocutory context.

**B. Denial of Certiorari in An Interlocutory Context Is Consistent with General Practice and Is Particularly Appropriate Under the Circumstances Involved Here.**

It is a commonplace that, in general, certiorari ought not to issue in an interlocutory context. For example, in *Brotherhood of Locomotive Firemen v. Bangor & Aroo-*

*stook, R.R.*, 389 U.S. 327, 328, (1967) it was said, "Because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

The circumstances involved here make adherence to that principle particularly appropriate.

1. **The Pro-Enactment Posture of the Opinion Without Final Foreclosure of Defense.**

The opinion of the Court of Appeals gives rise to no danger of precipitous ouster or frustration of Title VII or Section 1981 in any sense. To the contrary, it remands for full inquiry and determination and thus serves to expedite enforcement, if ultimately found warranted, of the wholesome legislative policy and purpose in the vital field of employment. And especially persuasive of the urgency of resolution at the earliest possible time is the fact that one whole aspect of the invidious discrimination alleged is unmistakably ripe for further proceedings in the district court now, without interference on account of concerns which touch, at best, the other claim of discrimination, which are themselves at least questionable and may disappear or alter in light of additional evidence, and which can, to the extent still viable, be raised later on appeal for more intelligent examination with the benefit of a thorough record.

On the other hand, nothing in the opinion necessarily forecloses the possibility of successful defense on further showing cognizable in law. As to both the claims of discrimination involved, the opinion expressly keeps open petitioner's opportunity to defend. As to both, it remands for all appropriate proceedings, including ultimate disposi-

tion in the district court, following which, of course, petitioner will be at liberty to appeal should the judgment prove adverse and be deemed to result from error.

### 2. The Harm of Delay Occasioned By This Court's Review.

Inevitably, of course, this Court's review would result in considerable delay in full litigation and potential cure of the practices complained of, including the facet of discrimination unaddressed by the petition. We respectfully submit that there should be no dearth of opportunity in the relatively near future, and on a full record in a non-interlocutory context, for such additional guidance, if any, on issues like those raised in the present petition as this Court believes to be of sufficient urgency and importance to warrant its attention. Certainly, if such guidance is ever to be undertaken in a pretrial context, prudence would seem to dictate that this occur only where, unlike here, the decision of the Court of Appeals fails to do homage to the vital policies fundamentally at stake. If nothing else of comfort to petitioner, this Court's intercession now will delay trial and thus contribute significantly to the longevity of practices which are alleged and may be found to constitute invidious employment discrimination on a classwide basis. It is not amiss, indeed, to wonder whether such delay is not at bottom the very motivation for the present petition.

## C. No Similar Considerations Prevailed in Hishon.

Since the petition has been so obviously (and so fallaciously) tailored to "ride" into this Court in the wake of its action with respect to *Hishon*, it merits stress that

none of the considerations militating against intercession discussed above prevailed there. The Eleventh Circuit had totally ousted applicability of the legislation, thereby sounding the death knell of the litigation as a whole and on reasoning which, if erroneous, threatened massive defeat of the vital legislative policy. We hope to demonstrate later that the asserted kinship and conflict with *Hishon* are nothing but figments of a fertile imagination. In any event, however, it seems clear that nothing likely to be ultimately canvassed by this Court there should delay yet longer here the further proceedings in the district court unquestionably necessary on vital issues, including an aspect of invidious employment discrimination alien to anything involved in *Hishon*.

## II

## THE PETITION DISTORTS THE RECORD IN DEFIANCE OF THE CONTROLLING PRINCIPLES TO MAXIMIZE CHANCES OF THIS COURT'S INTERCESSION

As we shall see later, the petition does not hesitate to do distortive violence to the opinion of the Court of Appeals in order to manufacture conflicts and perils calculated to capture this Court's attention and enhance the prospect of its intercession. To be discussed now are some of the factual distortions undertaken to the same end. At every opportunity, the petition simply takes the record before the district court (which, at minimum, was subject to conflicting appraisals in various important respects) in the light most favorable to the objectives of the petition. This, of course, defies the familiar principles requiring

that, whether on review of dismissal on a motion to dismiss or on a motion for summary judgment, the record must be taken in the light most favorable to the opponent, including all reasonable inferences and constructions. (E.g., *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).)

The factual focus of the petition is on rather massive and basically meaningless details concerning the history and makeup of company ownership, all designed to give the false impression that familially motivated discrimination in *stock ownership* is the preeminent issue and to submerge the pervasive and two-faceted, racial and ethnic discrimination in *employment* revealed by the record in the required light most favorable to respondents. Although the Court of Appeals overcomes the technique to an extent sufficient for its purposes, it does so in a rather bare-bones way, which can be read as even giving too much credit to the company's assertions and which can, in any event, stand brief amplification for the sake of clarity.

**A. The Nature of the System's Basic Evil.**

Under the pleading and showing by respondents, denial of equal employment opportunity is the essential wrong, with exclusion from shareholding status being merely one of the implementing practices along with others, such as perpetuation of the "right of assignment" in collective bargaining agreements. To illustrate, two affiants declared, "Although I have not liked being excluded from shareholding, my main complaint is that I have not received, and do not receive, an equal opportunity to improve my position or equal pay for equal work, shareholder or not."

**B. The Overall Importance of the Persistently Ignored Facet of Discrimination.**

As already mentioned under heading IA above, one entire facet of the discriminatory system has persistently been ignored by petitioner, namely, the discrimination as between nonshareholding minority employees and other nonshareholding employees. At all stages, petitioner has not even bothered to address the inculpating allegations and data. The reason seems clear. That aspect of discrimination is not only telltale in its own right, but also speaks to the pervasive, racially and ethnically motivated discrimination tainting the employment system as a whole, including the disparate treatment as between the minority employees and the shareholding employees of Italian ancestry, which petitioner would have us believe results purely from historical accident and benign familial concerns.

**C. The Familial Fallacy.**

The plain truth is that the discrimination as among nonshareholding employees forcefully in itself refutes the familial motivation theory offered by petitioner to explain imbalances in its system. Moreover, the fact is that solicitude for "family" members cannot reasonably account for the exclusively Italian makeup of shareholders throughout the history of defendant company. The number of shareholders, originally only five in number, swelled to a peak of 208 at one point, and the practice before 1968 did not preclude permitting "friends" as well as family members from becoming shareholders. The showing submitted below significantly omits data applicable to the nearly 60 years preceding 1964, including the peak years. Even with this

lacuna, the showing reveals that "friends" have been accepted in several instances and that the friendship concept has been stretched considerably, including in one instance the nephew of a friend of a shareholder. One is left to conclude that persons of other than Italian ancestry, including fellow workers of long standing, have uniformly failed to qualify as "friends" of shareholders, or to become members of a "family" numbering in the hundreds, a circumstance hardly at variance with the discriminatory pattern and intent shown by the proof favorable to respondents.

**D. The Bogus Bidding System.**

Much was shown in the district court by respondents to refute the purported showing by petitioner that, except for the admitted preferment of shareholding employees out of familial solicitude, all of the more desirable jobs have for years been filled in accordance with seniority under a bidding system. Again, however, let it suffice now to recall the data discussed under heading IA1. above, which are in themselves cogent of utter disregard for seniority in the course of invidiously preferring other non-shareholding employees over those who are minority employees.

**E. The Fictions Concerning the "Right of Assignment."**

In the same vein, it is unacceptable that the so-called "right of assignment" reserved by the company has only been used to implement its shareholder preference plan. Obviously, it has exercised its power (under whatever appellation) for invidious preferment of other nonshareholding employees over minority nonshareholders.

No less fictional is the suggestion that the "right of assignment" finds venerable and contractual root in the company's governing documents. It achieves contractual recognition only (anomalously enough) in the collective bargaining agreements with the complicit union. It has been perpetuated by choice alone and for no other office than as a device by which to assure the ability to prefer the shareholding employees of exclusively Italian ancestry over other employees, especially minority employees, without regard to seniority or other valid and usual employment criteria.

**F. The Fallacy of Especially Demanding Duties for Shareholders.**

It is also untrue that the Italian shareholding employees are required to perform more demanding duties than the minority employees. Discovery elicited admissions that no skills or qualifications peculiar to the Italian shareholders are necessary to fill the better jobs.

**G. The Wholesale Disparity Resulting from the Share holder Preference Plan.**

Although much more might be added, the following eloquently illustrates the degree to which the shareholder preference plan has resulted in disparate treatment and impact:

In 1978, 115 of 119 shareholding employees (over 95%) actively engaged in the garbage collection occupations were classified and paid in the two highest-paying positions, head route driver or single driver. Only one shareholding employee was classified as a helper. In contrast, of the

362 nonshareholders employed in those occupations, 272 (approximately 75%) were classified and paid as helpers. Only 70 nonshareholding employees (less than 20% of their total number) were head route drivers or single drivers.

At the end of 1978, there were 38 nonshareholding employees senior to 29 shareholders. Of those 38, 36 (10 and 26, respectively) were black and Spanish-surnamed employees. Of the ten senior black persons, nine were still paid as helpers in 1978 and one as a single driver. Of the 26 Spanish-surnamed persons, 19 were paid as helpers, six as single drivers, and one as head route driver (having first obtained that position in 1978, after 21 years as a helper). In contrast, of the 29 shareholders junior to the 36 minority employees, 22 occupied the highest category of head route driver, including six shareholders employed more than ten years later than the 36 seniors.

As of April 1979, there were 145 nonshareholding employees, 43 of them black and 102 Spanish-surnamed, senior to eight shareholding employees, at least six of whom (75%) were head route drivers. Of the 145 seniors, in contrast, only one (less than 1%) was a head route driver, the aforementioned person attaining that position after 21 years as a helper. The six junior shareholding head route drivers were first hired more than ten years later than nine black and 19 Spanish-surnamed employees still paid as helpers.

All officers, managers, and foremen were shareholding employees as late as the end of 1978.

## III

## THERE IS NO TRUE KINSHIP WITH THE SUBJECT MATTER OF HISHON OR CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION THEREIN

Petitioner's reliance on the Eleventh Circuit's decision in *Hishon v. King & Spaulding*, 678 F.2d 1022 (11th Cir., 1982) to generate a conflict worthy of this Court's attention is clearly misplaced.

In *Hishon*, the Eleventh Circuit was called upon to determine whether a law firm, organized as a partnership, violated Title VII in its refusal to promote a female associate to partner. The employee contended that the partnership was in reality a corporation of which the partners were employees and that, therefore, partnership status was a "term, condition or privilege of employment" within the reach of Title VII.

The court rejected the contention and held Title VII inapplicable. Because the law firm in fact operated as a partnership in various ways, it could not be deemed to be a corporation. According to the court, in a partnership, as expressly distinguished from a corporation, the working partners are employers and owners, rather than employees. Crucial to the decision was the court's emphasis that "in this instance . . . the form *is* the substance." (Italics in the original.)

In other words, had the employee's contention of corporate status prevailed in *Hishon*, the court would have reached the opposite result, and correctly, since it is indisputable that Title VII applies to the employment practices

of corporations. (*Sumitomo Shoji America v. Avagliano*, .... U.S. ....., 72 L.Ed. 2d 765 (1982).)

In sharp contrast, of course, petitioner here is unquestionably a corporation, the very kind of entity properly recognized by the court in *Hishon* as subject to Title VII. The company enjoys now, and has for some 60 years enjoyed, all the benefits of corporate status under the full panoply of articles of incorporation, bylaws, and the like. Contrary to intimations in the petition, the corporation, which presently has 135 shareholders and at one time had as many as 208, is not even a close corporation under the laws of California, which limits such status to entities with no more than 35 shareholders. (*Cal. Corp. Code*, § 158(a).) It operates under a governmental franchise granted to it as a corporation. The fact is that it is a major corporate enterprise with hundreds of employees, including 500 or so performing essentially all scavenger duties for a populous county.

Thus, rather than being in conflict with the decision of the Eleventh Circuit, the present opinion of the Ninth Circuit is not only consistent with it, but is actually compelled by the pivotal distinction between corporation and partnership recognized by it. Petitioner vainly complains that the form of business entity ought not to make a determinative difference, but it forgets that, had such a distinction not been made in *Hishon*, Title VII would have been applicable there as well.

## IV

## NO NOVEL ISSUES CONCERNING THE APPLICATION OF TITLE VII TO STOCK OWNERSHIP ARE TRULY INVOLVED

In its effort to generate novel issues, petitioner has attempted to transform a straightforward case of employment discrimination into a question of the applicability of federal legislation to issues of stock ownership. The Ninth Circuit, however, reached no conclusion touching on such a subject in its opinion. To the contrary, the court expressly reserved decision on the issue of whether restrictions on stock ownership violate Title VII. (Appendix A to Petition, p. 13.) According to the court, the matter was strictly one of employment discrimination and, as such, clearly within the ambit of Title VII.

## V

## THE DECISION OF THE NINTH CIRCUIT IS CORRECT

### A. Discrimination Between White and Minority Nonshareholders.

The Ninth Circuit's decision, as noted above under heading IA, holds that both Title VII and Section 1981 afford valid bases for relief on allegations of discrimination between white and minority nonshareholders. In so ruling, the court expressly recognized that the district court had erred in its summary disposition of the claim. (Appendix A to Petition, pp. 6-9.) As we have seen, petitioner does not even attempt to address in a meaningful way this aspect of the decision, conceding its validity and the consequent need for further proceedings in the district court.

**B. Employment Discrimination Rather Than Stock Ownership.**

As discussed under heading IV above, the Ninth Circuit's decision rests on a determination that the issue before it involved employment discrimination rather than stock ownership questions. (Appendix A to Petition, p. 10.) The court correctly pointed out (at p. 12):

> "To the extent that preferential wages, hours, and job assignments are tied to ownership of the Company's stock, the shareholder preference plan violates Title VII because the plan's effect is
>
> > to discriminate against [plaintiffs] with respect to [their] compensation, terms, conditions, or privileges of employment because of [their] race, color, . . . or national origin.
>
> 42 U.S.C. § 2000e-2(a)."

In so holding, the court noted, with unchallengeable accuracy, that section 2000e(b) of Title VII, which exempts a business entity with fewer than 15 employees from Title VII coverage, could not apply to a corporation with over 500 employees. (Appendix A to Petition, pp. 12-13.) Although petitioner argued (as it does now) that family ownership somehow exempts a business from the legislation, no such exemption was provided by Congress, and the Court of Appeals naturally refused to create one.

**C. Nepotism Not a Defense.**

No single authority, either cited by petitioner or otherwise known to us, has recognized that nepotism is a valid defense to allegations of discrimination under Title VII. The court's rejection of such a defense was therefore cor-

rect and fully in accord with precedent, including but hardly limited to the decisions it cited. (Appendix A to Petition, p. 11-12.)

**D. Meritless Constitutional Challenges.**

Petitioner's challenges to the Ninth Circuit's decision, based on alleged violations of associational and property rights, are meritless. They are tantamount to attacks on the legislation itself. The constitutionality of Title VII is beyond doubt. It is fully in accord with the tradition attributed to itself by this Court in its recent self-appraisal as a court which has "consistently repudiated" distinctions between citizens based solely on their ancestry as "odious to a free people whose institutions are founded on the doctrine of equality." (*Regents of The University of California v. Bakke*, 438 U.S. 265, 290-91, (1978).) To the extent that associational and property rights are affected by the legislation, they cannot defeat the paramount goal of equal employment opportunity embodied in Title VII.

**1. The Asserted Familial Rights of Privacy and Association.**

Petitioner's attempt to invoke constitutional provisions relating to family rights is entirely inapposite, factually and legally. It requires strained liberality, indeed, to consider 135 shareholders or more, obviously with differing progenitors, as a "family." In any event, of course, familial concerns are not beyond valid regulation where, as in the case of Title VII, sufficien. public interest is involved. (E.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943).)

### 2. The Question-Begging Proprietary Rights Argument.

The attempt to invoke "liberty" and "property" provisions of the Constitution also begs the question. We need not burden this Court with the procession of authority putting beyond doubt that those provisions do not preclude reasonable regulation in the public interest, including the countless regulations affecting employment.

## E. The Futile Arguments Concerning Small Businesses and Closely Held Corporations.

Petitioner's discussion of the merits of small businesses and closely held corporations and the wisdom of protecting them against undue interference are also futile as a basis for challenging the result reached by the Court of Appeals here. As noted under heading III above, this business is neither small nor closely held. In any event, the Court of Appeals does nothing more novel or adventurous in this connection than apply Title VII as unmistakably written by Congress, which has seen fit (and reasonably in view of the evil addressed) to include all employers having the required number of employees, whether their businesses be owned by one or hundreds of persons and whether they be incorporated or not. Illustrative of the wisdom of Congress in this regard is the fact that, according to the very scholar improvidently referred to by petitioner, the entities describable now or in the recent past as close corporations include Ford Motor Company and Hallmark. (O'Neal, *Close Corporations* (1970 ed., supplemented 1982) § 1.03, p. 7.)

## CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

B. V. YTURBIDE
COUNSEL OF RECORD
GUNHEIM & YTURBIDE
*Attorneys for Respondents*